Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BARRY KAPLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

I. Whether the Court of Appeals erred in finding a sufficient "affect" on interstate commerce to support federal jurisdiction under the Hobbs Act (18 U.S.C. § 1951) where: a) the charges of conspiracy and attempt to commit extortion were based on a plan, possibly involving violence, for petitioner to obtain his own personal funds from a Panamanian in Panama, in the form of a check payable to a Bahamian attorney for deposit in the Bahamas but transmitted through Florida; and b) at some unspecified future time, those personal funds obtained from an individual in Panama might be expended in the United States?

II. Whether the Court of Appeals erred in holding that prosecution under the Hobbs Act (18 U.S.C. § 1951) did not require proof that the alleged effect on commerce be adverse?

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BARRY KAPLAN,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner Barry Kaplan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eleventh Circuit (*en banc*) (App. C, *infra*, 17a) is reported at 171 F.3d 1351 (11th Cir. 1999). The order granting rehearing

en banc (App. B, *infra*, 15a) is reported at 148 F.3d 1223 (11th Cir. 1998). The vacated panel opinion (App. A, *infra*, 1a) is reported at 133 F.3d 826 (11th Cir. 1998).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 9, 1999. This Petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) provides:

> The Congress Shall have the Power*** To Regulate Commerce ***among the several States

18 U.S.C. § 1951 (the Hobbs Act) provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in

violation of this section shall be fined under this title or imprisoned not more than twenty years or both.

(b)(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE.

Petitioner Barry Kaplan, a Florida resident, had entrusted personal funds to a Panamanian attorney in Panama. When that attorney refused to return the money in 1988 or 1989, Kaplan sought the advice and assistance of others, including another Panamanian attorney, a Florida state court judge and an American attorney representing the leader of Panama at that time. The American attorney, who formulated the plan for the return of the money in Panama, was a United States government agent. While, in a monitored conversation, he

advised Kaplan that the plan could involve violence, he took no action to implement it. Nevertheless, Kaplan was indicted, in the United States District Court for the Southern District of Florida, for, and convicted of, conspiracy and attempt to commit extortion in violation of the Hobbs Act. See App. C, 19a-21a, 171 F.3d at 1352-1353.

A panel of the United States Court of Appeals for the Eleventh Circuit vacated Kaplan's convictions, holding that the government had "failed to establish the effect on commerce required to support a prosecution for extortion under the Hobbs Act"(App. A, 14a, 133 F.3 at 831). On rehearing *en banc*, the Court of Appeals reached a different conclusion, finding that the scheme for Kaplan to obtain the return of his own money in Panama would have produced a sufficient effect on commerce to warrant conviction under the Hobbs Act because, to benefit the co-conspirators, the conspiracy required at least one transaction between Florida and Panama — namely, the payment of the extortion demand to Kaplan (App. C, 24a, 171 F.3d at 1355).[1] In essence, the *en banc* court of appeals concluded that the proposed extortionate payment of personal funds from one individual to another in and of itself provided the effect on commerce sufficient for federal jurisdiction under the Hobbs Act, if that payment crossed a state line and might, at some unspecified future date, be expended in the United States; no affect on any business or other commercial activity or enterprise distinct

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[1] However, the court of appeals also found, as a matter of fact, that the check was to be payable not to Kaplan, but to a Bahamian attorney, referenced to an offshore account (App. C, 21a, 171 F.3d at 1353). The court did not explain how a check payable to Bahamian attorney referenced to an offshore account constituted payment to Kaplan in Florida, or how payment of funds from Panama to a Bahamian for deposit in an offshore account had an effect on interstate commerce.

and apart from the payment of the money allegedly extorted was required. The *en banc* court of appeals also concluded that the effect on commerce required to invoke the Hobbs Act need not be adverse, overruling *United States v. De Parias,* 805 F.2d 1447 (11th Cir. 1986), *cert. denied,* 482 U.S. 916 (1987).

REASONS WHY THE WRIT SHOULD BE GRANTED.

This case presents significant and recurring questions concerning the federalization of criminal law in denigration of tenets of federalism and the traditional primary role of the state in criminal law enforcement. It asks this Court to provide criteria and standards for determining when allegedly extortionate activity sufficiently "affects commerce" to transform a local offense into a federal offense which may, constitutionally, be prosecuted under the Hobbs Act. Does a plan to obtain one's own money from a Panamanian in Panama, for deposit by a Bahamian attorney in an offshore account, even through the possible use of violence, constitute conspiracy or attempt to commit extortion that "obstructs, delays or affects commerce or the movement of any article or commodity in commerce" in violation of the Hobbs Act, simply because the check constituting the extorted proceeds would go through Florida? Does the likelihood that, at some unspecified future time, those personal funds to be obtained from an individual in Panama might be expended by an individual in the United States support federal jurisdiction under the Hobbs Act? Or does prosecution for that plan violate the constitution, as well as the Hobbs Act, by impermissibly federalizing an otherwise local or even foreign offense? Must the effect on commerce required to invoke the Hobbs Act be

adverse? Petitioner Kaplan submits that the *en banc* decision below conflicts with decisions by other Courts of Appeals and with this Court's analysis of the concerns of federalism and the scope of constitutionally permissible regulation under the Commerce Clause set forth in cases such as *United States v. Lopez*, 514 U.S. 549 (1995), *Russell v. United States*, 471 U.S. 858 (1985) and *Alden v. Maine*, No. 98-436, 1999 WL 412617 (U.S. June 23, 1999). He urges that certiorari be granted to resolve those conflicts and to clarify the jurisdictional requirements of the Hobbs Act.[2]

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[2] This case does not challenge the general constitutionality of the Hobbs Act, which unlike the Gun Free School Zones Act held unconstitutional in *United States v. Lopez, supra*, does require that a finding be made in each case that the particular activity alleged to be unlawful obstructs, delays or affects commerce or the movement of any article or commodity in commerce. This statutory requirement suggests Congressional recognition that without such limitations the Hobbs Act would exceed the scope of regulation authorized by the Commerce Clause. And, as this Court reiterated in *Lopez, supra* at 553, "limitations on the commerce power are inherent in the very language of the Commerce Clause."

Petitioner submits that application of the Hobbs Act to the extortion of personal funds from an individual, under the facts and circumstances here, goes beyond the outer limits of the constitutional limitations on the commerce power, transforming, without justification, a local offense into a federal case.

I. THE COURT OF APPEALS ERRED IN FINDING A SUFFICIENT "AFFECT" ON INTERSTATE COMMERCE TO SUPPORT FEDERAL JURISDICTION ON CHARGES OF CONSPIRACY AND ATTEMPT TO COMMIT EXTORTION IN VIOLATION OF THE HOBBS ACT (18 U.S.C. § 1951) BASED ON THE PROPOSED TRANSMITTAL OF PERSONAL FUNDS FROM AN INDIVIDUAL IN PANAMA TO AN INDIVIDUAL IN FLORIDA, IN THE FORM OF A CHECK FOR DEPOSIT IN THE BAHAMAS, AND THE POSSIBILITY THAT AT SOME UNSPECIFIED FUTURE TIME, THOSE PERSONAL FUNDS MIGHT BE EXPENDED IN THE UNITED STATES.

The *en banc* majority below concluded that a plan to use violence or threats of violence to obtain personal funds from an individual in Panama to repay a personal debt to an individual in the United States could be prosecuted under the Hobbs Act, because the money would be transmitted from Panama to the United States (in the form of a check payable to a Bahamian attorney and referenced to an offshore account) and, at some unspecified future time, the money might be distributed in the United States and spent. According to the *en banc* majority, this transmittal and anticipated future spending provided a sufficient effect on interstate commerce to support federal jurisdiction. Yet, this is exactly the type of attenuated nexus that this Court has, in other contexts, deemed inadequate to support federal jurisdiction based on the Commerce Clause, and other courts of appeals have held insufficient to establish a Hobbs Act violation.

While the Commerce Clause authorizes Congress to regulate commerce among the states, this Court has more than once expressed its concerns with efforts to federalize every activity through an expansive reading of the Clause. In *United States v. Lopez, supra,* 514 U.S. at 557 (quoting from *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937)) this Court reiterated:

> the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.".

Criminal law enforcement is an area "where States historically have been sovereign" (*id.,* at 564).

In *Lopez*, this Court held that a criminal statute prohibiting the possession of a firearm in a school zone was not a constitutionally permissible exercise of Congressional authority under the Commerce Clause. This Court rejected the government's theories that: 1) possession of a firearm may result in violent crime which could affect the national economy through insurance costs and a reduction in the willingness of people to travel to areas perceived to be unsafe; and 2) the presence of guns poses a substantial threat to the educational process by threatening the learning environment, thereby resulting in a less productive citizenry which would have an adverse effect on the Nation's economic well

being (514 U.S. at 563-564). These speculative affects on interstate commerce posited by the government were simply too attenuated to support federal jurisdiction. Moreover, the potential impact of accepting those theories would be, as this Court stated, to recognize virtually limitless federal regulatory authority: "If we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." (*id.*, at 564).

Similarly, in *Williams v. United States*, 458 U.S. 279 (1982), this Court rejected a broad statutory interpretation of a false statements statute (18 U.S.C. § 1014) which would have expanded federal jurisdiction in an area that has traditionally been regulated by state law. Instead, using a narrow interpretation of the term "statement", this Court limited the statute's scope to avoid that federalization.

The *en banc* decision below also conflicts with decisions in various courts of appeals which have limited the scope of the Hobbs Act, by recognizing that it requires proof of an effect on commerce separate and apart from the payment of an extortion demand or the possession of a stolen item in order to establish federal jurisdiction. In determining whether evidence was sufficient to establish that an act had the effect on commerce required for federal jurisdiction, they have drawn distinctions between extortions and robberies directed against individuals and extortions and robberies directed against businesses. See, e.g., *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982); *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995); *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994); and *United States v. Frost*, 77 F.3d 1319 (11th Cir. 1996), *modifying* 61 F.3d 1518 (11th Cir. 1995).

In *Mattson*, *supra*, defendants were charged with extorting money from an electrician seeking a supervising electri-

cian's license. The court found the connection between the extortion and an effect on interstate commerce insufficient to provide federal jurisdiction, rejecting the argument that the necessary relationship could be found in the fact that the electrician's company was engaged in interstate commerce. That asserted connection was too attenuated; payment for the license came from the personal assets of the electrician and not from the company, and the electrician himself was not engaged in interstate commerce. The case might be different, the court noted, if the business had been the victim of the extortion.

Defendants in *Quigley, supra,* were charged with a Hobbs Act violation arising from their theft of a small amount of money from, and assault of, two men on their way to purchase beer from a liquor store. The court held that, notwithstanding the interstate movement of beer, the robbery did not have the effect on interstate commerce necessary to federalize the robbery and assault. Again, the court noted that where an individual is the alleged victim, the requisite effect on interstate commerce may be lacking (*id.*, 53 F.3d at 910-911).

In *Collins, supra,* defendant was charged with a Hobbs Act violation after he robbed an individual at gunpoint at his home and stole items including his car and cellular phone. Rejecting arguments that the theft prevented the victim from attending a business meeting and using his phone for business calls, the court found an insufficient effect on interstate commerce to support a federal prosecution. Noting that the victim was an individual, not a business, the court stated: ". . . it is clear that the Hobbs Act was intended to reach only certain activities that hamper interstate business, reflecting the long-recognized principle that the states are best positioned and equipped to enforce the general criminal laws." (*id.*, 40 F.3d at 101).

In *United States v. Frost, supra,* the court held that attempts to extort money from a city councillor would not support an alleged Hobbs Act violation; evidence that the city employed an out-of-state engineering firm, and sometimes purchased items that had moved in interstate commerce, was not sufficient to establish federal jurisdiction, given the absence of any evidence that the resignation of one member of the council would have had any effect on such purchases.

Petitioner submits that, as illustrated above, federal jurisdiction requires more than the transportation of money across a state line or the later spending of the proceeds of an alleged extortion where, as in this case, the alleged victim of the extortion is an individual induced to part with personal funds rather than a business or commercial enterprise. The federal government is one of enumerated powers *(see,* U.S. Const., art. I, § 8), with non-delegated powers reserved to the states or the people *(see,* U.S. Const. amend X). *See, e.g., Lopez, supra* at 552; *Alden, supra.* One area where the states have had a long-standing primary role is criminal law enforcement. See *Lopez, supra* at 561, n.3. As this Court recognized in *Lopez, supra,* in today's society almost every action can be characterized as, at some point, possibly having some type of connection with interstate activity.[3] Without requiring proof that the extortionate activity has impacted some independent, existing commercial activity or business enterprise in an explicit and concrete way, the constitutionally based

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[3] As this Court also stated in *United States v. Lopez, supra,* 514 U.S. at 559, it has never adopted the position that . . . "'Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.'"

requirement of an effect on commerce is essentially eliminated from the Hobbs Act.

Requiring a relationship to some explicit commercial activity apart from an individual's payment of personal funds is consistent with the language and purpose of the Hobbs Act as well as principles of federalism.[4] As introduced in the House of Representatives in 1945, the bill, an amendment to the Anti-Racketeering Act of 1934, was entitled "an act to protect trade and commerce against interference by violence, threats, coercion or intimidation" 91 Cong. Rec. 11839 (1945).[5] The debate in the House of Representatives focused on whether or not the bill was intended to be used to prosecute strikers and to interfere with labor unions. See, *United*

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[4] The language of the Act essentially defines commerce as commerce within or between certain geographic areas. Dictionaries define the word commerce as forms of business activity. As defined in 1 Compact Edition of the Oxford English Dictionary 677 (Oxford University Press 1971), commerce is "exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise, esp. as conducted on a large scale between different countries or districts." The American Heritage Dictionary, 3rd ed., defines commerce as "the buying and selling of goods, especially on a large scale, as between cities or nations." The Random House Dictionary of the English Language, Second Edition - Unabridged 411 (Random House, N.Y. (1987)) defines commerce as "an interchange of goods or commodities , esp. on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce); trade; business". It is not defined as the payment of money in response to a wrongful demand.

[5] "'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt about the meaning of a statute.'" *Almendarez-Torres v. United States*, 524 U.S. 224, ___, 118 S.Ct. 1219, 1226 (1998).

States v. Culbert, 435 U.S. 371, 377 (1978). Those supporting the amendment and denying such an intent described the activities to be protected as plainly commercial activities — the transportation of produce, dairy products and other goods to metropolitan areas by farmers and truckers who were stopped and interfered with by union members and others demanding money as they attempted to make their deliveries. See, e.g., 91 Cong. Rec. 11911-11912 (1945). It was described as a bill "to protect the right of citizens of this country to market their products without interference from lawless bandits." 91 Cong. Rec. 11912 (1945).

While in *Stirone v. United States*, 361 U.S. 212, 215 (1960) this Court spoke of the purpose of the Hobbs Act as a Congressional intent to "use all [its] constitutional power to punish interference with interstate commerce by extortion, robbery or physical violence . . .", this Court's explanation of the interference in *Stirone* to be remedied by the Hobbs Act prosecution illustrates the need to maintain proof of some explicit, concrete effect on pre-existing independent interstate commercial activity as a predicate for federal jurisdiction. As this Court explained:

> Had [the victim's] business been hindered or destroyed interstate movements of sand to him would have slackened or stopped. The trial jury was free to find that commerce was saved from such a blockage by [the victim's] compliance with [defendant's] coercive and illegal demands. It was to free commerce from such destructive burdens that the Hobbs Act was passed.

Stirone, supra, 361 U.S. at 215. Thus, this Court described the purpose of the Hobbs Act in terms of the extortionate demand's effect on separate, preexisting, commercial activity or business.

This Court has made the same point in addressing another criminal statute predicating federal jurisdiction on the Commerce Clause. Analyzing 18 U.S.C. § 844(i) (making it a federal crime to, *inter alia,* burn a building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce) in *Russell v. United States,* 471 U.S. 858, 860, 862 (1985), this Court again described the need for proof that an action affected business or commercial activity, separate and apart from the proscribed act itself, to justify regulation under the Commerce Clause. In holding that the statute applied to the burning of an apartment building used for rental property and treated as business property for tax purposes, this Court noted that given the clearly commercial nature of rental properties, the requisite effect on commerce was plain. In addition, this Court noted that Congress had questioned the constitutionality of extending coverage to the burning of private homes and specifically required proof of use in an activity affecting interstate commerce in each case to avoid unconstitutional overbreadth.

In contrast, where the burning of a private dwelling by a disgruntled neighbor was prosecuted under § 844(i), the defendant's conviction was reversed because of the lack of effect on interstate commerce. *United States v. Denalli*, 73 F.3d 328 (11th Cir.)(per curiam), *modified*, 90 F.3d 328 (11th Cir. 1996)(per curiam). And in *United States v. Gaydos,* 108 F.3d 505 (3rd Cir. 1997), the court held that the burning of a house that had permanently ceased to be rental property prior to its destruction by fire was not within the purview of § 844(i), because of the absence of effect on in-

terstate commerce at the time of the fire. "By failing to prove that the house was a rental property, the government has not satisfied the interstate commerce element of the statute." (*id.*, at 511).

In addition to requiring proof of an effect on commerce beyond the transmittal of the money demanded, this Court should recognize that any potential impact on commerce from actions such as the spending of personal funds paid pursuant to an extortionate demand at some undefined later point in time is too attenuated to supply federal jurisdiction. Indeed, the court in *United States v. Mattson, supra,* made a similar distinction in a Hobbs Act case. There, the court distinguished between an effect on interstate commerce established by the alleged extortion itself and an effect on interstate commerce eventually resulting from actions subsequent to the alleged extortion, stating that the Hobbs Act required proof of the former (*id.*, 671 F.2d at 1025). To apply the Hobbs Act because a person might, at some later date, spend money for goods or services with a nexus to interstate commerce would, given the expansive nature of today's economy, federalize every local extortion or robbery.

Not only is such a standard for federal jurisdiction analogous to that rejected by this Court in *Lopez, supra,* but it is also inconsistent with the language of the Hobbs Act itself. Extortion is defined in the statute (18 U.S.C. § 1951(b)(2)) as the obtaining of property from another. The extortion, therefore, would be complete after the money is obtained; it does not require spending the proceeds. The Hobbs Act speaks in terms of affecting commerce "by robbery or extortion", not affecting commerce by some future activity resulting from the extortion.

Accordingly, this Court should establish criteria and standards to guide the lower courts in reviewing the claimed ef-

fect on interstate commerce from alleged extortionate activities where, as here, the alleged victim of the extortion is an individual rather than a business or commercial enterprise. This Court should make it clear that under circumstances such as those presented here — the alleged victim was an individual in Panama refusing to return petitioner's money; there was no evidence that he was engaged in commercial activities or that petitioner's demand for the return of his own money would in any way impact commercial activity of the victim or others; and there was no evidence that this demand was part of a larger scheme or that the alleged victim would be depleting the assets of a business engaged in interstate commerce in order to meet the demand — the Hobbs Act does not apply. Rather, proper analysis of the language and intent of the Hobbs Act and tenets of federalism demonstrates that any prosecution should have been left to the state authorities.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT PROSECUTION UNDER THE HOBBS ACT (18 U.S.C. § 1951) DID NOT REQUIRE PROOF THAT THE ALLEGED EFFECT ON COMMERCE BE ADVERSE.

The court below also held that the effect on commerce required by the Hobbs Act need not be adverse, overruling *United States v. De Parias*, 805 F.2d 1447 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987) and citing agreement with decisions in the First, Fourth and Seventh Circuits not re-

quiring proof of adverse effect.[6] In so holding, the decision conflicts with cases decided by the Second and Fifth Circuits, holding that an adverse effect on commerce is required.[7]

The decision also conflicts with this Court's analysis in *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249 (1994). There, in the context of analyzing whether an economic motive is required to establish a violation of 18 U.S.C. § 1962(c) (the RICO statute), this Court stated that the statutory language included enterprises "whose activities 'affect' interstate or foreign commerce" and, quoted the following definition of affect: "'to have a detrimental influence on — used especially in the phrase *affecting commerce.*' An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." (510 U.S. at 258).[8] In *Stirone v. United*

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[6] *See, United States v. Tormos-Vega,* 959 F.2d 1103, 1113 (1st Cir. 1992); *United States v. Bailey,* 990 F.2d 119, 126 (4th Cir. 1993) and *United States v. Mattson,* 671 F.2d 1020,1024 (7th Cir. 1982).

[7] *McLaughlin v. Anderson,* 962 F.2d 187, 194 (2nd Cir. 1992) ("In order to make out a claim of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, Macgall needs to show that Anderson (1) induced Macgall with Macgall's consent, to part with property, (2) through the wrongful use of actual or threatened force, violence or fear (including fear of economic loss), (3) in such a way as to adversely effect interstate commerce."); *United States v. Snyder,* 930 F.2d 1090, 1093 (5th Cir. 1991) ("The judge correctly instructed the jury that to establish an offense under the Hobbs Act, the government must prove beyond a reasonable doubt three essential elements: (1) that Snyder induced a person to part with property; (2) that Snyder acted knowingly and willfully by means of extortion; and (3) that the extortionate transaction delayed, interrupted, or adversely affected interstate commerce.").

States, supra, 361 U.S. at 218, this Court also described the effect on commerce in terms of "interference" and "burden" — terms generally used to connote a negative or adverse, rather than a beneficial or neutral, impact.

Limiting Hobbs Act jurisdiction to cases where the government can establish an adverse effect on interstate commerce is also consistent with the canons of statutory construction addressing construction of a series of words in a statute. These canons generally provide that a more general word will be construed so as to be consistent with more specific words. Pursuant to the maxim of *noscitur a sociis*, "when two or more words are grouped together and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the specific word." 2A Sutherland Stat. Const. § 47.16 (5th Ed.), p. 183. *Ejusdem generis*, a variation of *noscitur a sociis*, provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland Stat. Const. § 47.17 (5th Ed.), p. 188. The Hobbs Act uses the series of words "obstructs, delays or affects". Both the more specific terms "obstruct" and "delay" connote particular types of adverse affects. "Delay implies a holding back, usu. by interference, from completion or arrival." (Webster's Seventh New Collegiate Dictionary, p. 218). Obstruct means "to block or close up by an obstacle; to hinder from passage, action or operation" (*id.*, p. 583). Interpreting "affect" in a

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[8] This Court further noted that acts "such as the alleged extortion, may not benefit the protestors financially but still may draw money from the economy by harming businesses such as the clinics which are petitioners in this case." (*id.*, at 260).

manner consistent with these definitions would also require an adverse effect, such as, for example, a loss of business or profit.

Petitioner submits that certiorari is also appropriate to resolve this difference among the Circuits and to determine whether a criminal prosecution under the Hobbs Act requires proof of an adverse affect on commerce before penalties are imposed.

CONCLUSION.

In today's global marketplace with today's mobile society, the *en banc* court of appeals' position could make virtually every alleged extortion a federal offense. Uncle Joe threatens force to induce Aunt Tillie to sell a piece of her personally owned property located in another state and give him the proceeds. Should the Hobbs Act apply because the money came across a state line or because Uncle Joe might, at some later date, spend some of the money on goods that moved in interstate commerce? Under the analysis of the court below, it would. Yet, petitioner submits, such a prosecution would be inconsistent with the language and purpose of the Act, as well as principles of federalism.

This Court has addressed questions involving federalism in a number of contexts in recent years. It should grant certiorari here to resolve conflicts among the circuits concerning the requirements and proper scope of the Hobbs Act. It should also grant certiorari to set standards and criteria for application of the Hobbs Act (and other criminal statutes relying on the Commerce Clause for their jurisdiction) in a manner consistent with this Court's decisions limiting the breadth of federal jurisdiction to preserve the constitutionally

based, traditional roles of the states in our system of government.

Respectfully submitted,

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APPENDIX A.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Barry KAPLAN, Defendant-Appellant.

No. 95-4908.

United States Court of Appeals,
Eleventh Circuit.

Jan. 22, 1998.

Defendant was convicted in the United States District Court for the Southern District of Florida, No. 94-422-CR-SH, Shelby Highsmith, J., of attempted extortion and conspiracy to commit extortion under Hobbs Act. Defendant appealed. The Court of Appeals, Birch, Circuit Judge, held that potential transfer of funds from point outside United States to point inside state, for purpose of paying extortion demand, does not establish effect on commerce sufficient to support federal jurisdiction under Hobbs Act.

Reversed.

Bruce A. Zimet, Ft. Lauderdale, FL, for Defendant-Appellant.

Kendall Coffey, Dawn Bowen, Anne Ruth Schultz, Kathleen M. Salyer, Lawrence D. LaVecchio, U.S. Atty., Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before ANDERSON and BIRCH, Circuit Judges, and WOODS,* Senior Circuit Judge.

BIRCH, Circuit Judge:

This case requires us to determine whether a potential transfer of funds from a point outside the United States to a point inside a State, for the purpose of paying an extortion demand, establishes an effect on commerce sufficient to support federal jurisdiction under the Hobbs Act. *See* 18 U.S.C. § 1951. The district court held, and the government contends on appeal, that the simple payment of an extortion demand in interstate commerce, without any further effect on commerce, is sufficient to support a conviction under the Hobbs Act. We REVERSE.

BACKGROUND

In 1984 and 1985, defendant-appellant, Barry Kaplan, a resident of Miami, Florida, placed several hundred thousand dollars into two Panamanian bank accounts with the assistance of Pablo Arosemena, a Panamanian lawyer. Kaplan also gave Arosemena power of attorney over the two bank

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* Honorable Henry Woods, Senior U.S. District Judge for the Eastern District of Arkansas, sitting by designation.

accounts for the ostensible purpose of disguising his ownership of the money and thus evading taxation in the United States. Thereafter, Kaplan sought access to those funds, but Arosemena refused to return the money. In January 1989, Kaplan met with Arosemena in his Panamanian office, where Kaplan claims Arosemena admitted that he had stolen the money. Kaplan also contends that Arosemena brandished a firearm during their conversation as he asked Kaplan what he was going to do about the theft.

Kaplan consulted another Panamanian lawyer, Mario Fonseca, to attempt to recover his money. Fonseca conducted an investigation into the matter and confirmed that Arosemena had stolen the money from the Panamanian accounts. When Fonseca met with Arosemena, Arosemena refused to deny the theft and warned Fonseca that he would report Kaplan's off-shore funds to the United States Internal Revenue Service if Kaplan pursued the matter. Fonseca immediately communicated this threat to Kaplan by letter, calling Arosemena's tactics "blackmail."

Fonseca testified that Kaplan could have brought a civil suit against Arosemena or sought criminal charges against him in Panama.[1] Fonseca explained, however, that a civil suit would have served no purpose because Arosemena claimed to have no assets. Moreover, as a criminal prosecution certainly would have caused Arosemena to lose his license to practice law, thereby eliminating his primary means of earning money, any such course of action also would have defeated Kaplan's objective of repayment.

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[1] Fonseca hired another Panamanian lawyer, Dr. Rafael Rodriguez, to prepare a civil suit against Arosemena but Kaplan decided not to pursue it.

Next, Kaplan discussed his predicament with Roy Gelber, then a Dade County Circuit Judge. Gelber had served as Kaplan's lawyer on another matter while he was still in private practice. Gelber volunteered to contact Raymond Takiff, a Florida lawyer who had represented General Manuel Noriega, then the de facto leader of Panama. Kaplan, Gelber, and Takiff began to discuss this matter in June 1989 and continued until the early part of 1990. Neither Kaplan nor Gelber, however, were aware that Takiff had begun to cooperate with the federal government in an attempt to resolve his own criminal problems. Takiff became an informant for the government on or about August 4, 1989, and he began to record his conversations with Kaplan and Gelber.[2] During these conversations, Takiff offered to contact high ranking individuals in the Panamanian Defense Forces ("PDF") who could retrieve the money from Arosemena in Panama. Although Takiff stated that his contacts would not kill Arosemena, the record shows that he expected those contacts to resort to violence or the threat of violence to obtain the money. On September 7, 1989, Takiff explained to Gelber and Kaplan that PDF soldiers would force Arosemena to sign cards to withdraw approximately $300,000 from a Panamanian bank account. Kaplan agreed to the details of the plan

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[2] Takiff's cooperation with the federal government was not limited to Kaplan's case. Takiff played a part in "Operation Courtbroom," an investigation into judicial corruption in Dade County. Takiff engaged in a series of secret transactions with Gelber in the course of this operation and Gelber eventually pled guilty to charges based on his acts of judicial corruption. Pursuant to his plea agreement, Gelber testified against Kaplan at trial.

and was aware that violence would play a part in the transaction.

Kaplan also decided that he would receive the money by accepting a check, in Florida, payable to a Bahamian attorney and referenced to another off-shore bank account. Although the transaction never took place, it is clear that Kaplan sought access to these funds because he had exhausted his personal assets and the record supports the inference that he would have made some attempt to use the money in Florida. Moreover, the record establishes that Gelber and Takiff were to receive a portion of the extortion demand as payment for their efforts.

Kaplan, appeals his conviction for attempted extortion and conspiracy to commit extortion under the Hobbs Act and argues that the evidence the government presented at trial was insufficient to show any effect on commerce as contemplated by the statute. Kaplan presented this issue to the district court in a motion for a judgment of acquittal and new trial pursuant to Fed. R. Crim. P. 29(a) & 33, but the district court denied relief. Although Kaplan challenges his conviction on a number of additional grounds, since we hold that the district court erred by finding an effect on commerce on the facts of this case, we limit our discussion to that issue.

DISCUSSION

The Hobbs Act provides for the federal prosecution of a defendant who attempts or conspires to extort property in a manner that obstructs or affects commerce. See 18 U.S.C.

§ 1951(a).[3] The language of the statute, as well its historical context, demonstrate that Congress did not intend to transform every extortionate transaction into a federal crime. Instead, the Hobbs Act applies only to those extortionate acts that affect interstate commerce. *See generally United States v. Staszcuk*, 517 F.2d 53 (7th Cir.1975) (*en banc*) (providing an excellent history of the Hobbs Act). As a result, the government must prove both extortion and an effect on commerce as the two essential elements of a Hobbs Act crime. *See Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 274, 4 L.Ed.2d 252 (1960) ("The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference."). Although the Hobbs Act's definition of commerce is intended to be broad, and we have held that the required effect on commerce need only be minimal, some effect on commerce nevertheless must exist to support federal jurisdiction. *See United States v. Castleberry*, 116 F.3d 1384,

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[3] The Hobbs Act provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section-
>
> . . . .
>
> (3) The term "commerce" means . . . all commerce between any point in a State . . . and any point outside thereof . . . and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951.

1386 (11th Cir.) (reaffirming that the government need only show that "the extortionate activity has a minimal effect on interstate commerce . . . ."), *cert. denied*, __U.S. __, 118 S.Ct. 341, 139 L.Ed.2d 265 (1997).

Kaplan argues that the government failed to provide evidence of how the extortion scheme in which he was involved could have produced an effect on commerce sufficient to support his conviction under the Hobbs Act. In reviewing the sufficiency of the evidence, we "consider the evidence in the light most favorable to the Government and draw all inferences and credibility choices in favor of the jury's verdict." *Id.* at 1387-88. We, therefore, must affirm Kaplan's conviction if any reasonable construction of the evidence would have permitted the jury to find guilt beyond a reasonable doubt. *See id.* at 1388. As the courts have recognized, however, proving an effect on commerce when an individual rather than a business entity is the target of the extortion is no simple matter. *See United States v. Collins*, 40 F.3d 95, 99-100 (5th Cir.1994).[4]

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[4] The *Collins* court held that:

> Criminal acts directed towards individuals may violate section 1951(a) only if: (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some "cumulative effect on interstate commerce."

Collins, 40 F.3d at 100 (footnotes and citations omitted). The government has made no argument with regard to the first two possibilities.

The government advances two theories to support the conclusion that Kaplan's plan, if completed, would have affected interstate commerce. First, the government argues that it has satisfied the Hobbs Act's jurisdictional prerequisite because if Kaplan's extortion demand had been successful the ensuing transfer of money from Panama to Florida would have constituted a transaction in interstate commerce.[5] In direct support of the government's argument, the Hobbs Act specifically defines commerce to include "all commerce between any point in a State . . . and any point outside thereof. . . ." 18 U.S.C. § 1951(b)(3). Nevertheless, the government has cited no case in which the victim's payment of an extortion demand, standing alone, provided the effect on commerce necessary to support a conviction under the Hobbs Act. The typical Hobbs Act case involves some element of commerce independent and apart from the transaction of paying an extortionist's demand. Indeed, the courts have gone to great lengths to identify how a defendant's actions affected that independent, preexisting commerce, rather than looking to the form of the extortion payment. *See, e.g., United States v. Hollis*, 725 F.2d 377, 380 (6th Cir.1984) (basing jurisdiction on a preexisting interstate contract between the parties rather than on the movement of the extorted funds across state lines). This approach is consistent with the language of the Hobbs Act, which criminalizes extortion that "obstructs, delays, or affects" commerce rather than extortion that itself constitutes commerce. 18 U.S.C. § 1951(a). Con-

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[5] Although the parties vigorously contest whether the government presented evidence that the money would have ever entered the United States, for the purposes of this appeal we assume, as we must, that the jury inferred that Kaplan, Gelber, or Takiff would have received money in Florida. *See Castleberry*, 116 F.3d at 1387-88.

gress enacted the Hobbs Act (and its statutory predecessor) to "eliminate the 'levy of blackmail upon industry'" and therefore intended the statute to "remove artificial restraints on the free flow of goods." *Staszcuk*, 517 F.2d at 57, 58. This legislative emphasis on protecting industry and business explains the judicial focus on the victim's connection to interstate commerce rather than the form or structure of the extortion payment.

The government's argument, however, would require that we extend the Hobbs Act to every act of extortion that constitutes an interstate commercial transaction. Although we do not doubt that Congress has the power to make the receipt of an extortion payment across a State border a federal crime, *cf. Castleberry*, 116 F.3d at 1387 (discussing the impact of *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), on the Hobbs Act's jurisdictional requirements), the language and history of the Hobbs Act does not indicate that Congress intended this statute to perform any such function.[6]

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[6] Our own research has uncovered only two cases that even suggest that the Hobbs Act applies to a case in which the victim's payment of an extortion demand would constitute the only nexus to interstate commerce. In *United States v. Blair*, a district court toyed with the idea that: "An individual may be extorted in a manner which affects interstate commerce if the actual extortionate payment forces the individual to perform a direct interstate transaction." 762 F. Supp. 1384, 1389-90 n.7 (N.D. Cal. 1991) (citing *United States v. Hoelker*, 765 F.2d 1422 (9th Cir.1985) (per curiam)). For the reasons discussed above, we find that the *Blair* court's reasoning on this point and its reading of *Hoelker*, which decides only that the McCarran-Ferguson Act does not take an insurance contract out of interstate commerce, to be seriously flawed. Similarly, in *Hollis*, 725 F.2d at 380 n.5, the court mused in *dicta* that the payment of an extortion demand might be sufficient to "affect commerce" when the defendant immediately took the money across state

The government's contention that *United States v. Davis*, 707 F.2d 880 (6th Cir.1983), supports its theory of jurisdiction is unpersuasive. In that case, the defendant, an elected sheriff in Ohio, required his deputies to make monthly contributions to his political war-chest and perform construction work at his home to ensure their continued employment. Some of these deputies were receiving funds under federal programs, and the evidence showed that some of this money was diverted to make contributions to the sheriff. The Sixth Circuit held that this diversion of funds in interstate commerce supported jurisdiction under the Hobbs Act. *Id.* at 884. In *Davis*, however, the court focused, not on the actual payment of the extortion demand to the sheriff (which by all indications would have been an intrastate transaction), but on the preexisting, independent commerce that the extortion affected: the payments to the deputies.[7] In this case, however, there was no diversion of funds already in independent interstate commerce because the victim had secured them for his

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lines. Subsequent courts, however, have rejected such an approach. *See, e.g., Collins*, 40 F.3d at 99 (finding that the movement of robbery proceeds across state lines was insufficient to affect commerce within the meaning of the Hobbs Act).

[7] The government attempts to bolster this argument by citing *United States v. Huynh*, 60 F.3d 1386, 1388-89 (9th Cir.1995), in which the defendant threatened to interrupt her victims' supplemental security income ("SSI") payments, which traveled from Alabama to Washington state, if the victims refused to pay her and buy her gifts. By now it should be clear that, on the facts of the *Huynh* case, the defendant's conduct affected independent, preexisting interstate commerce (the government's payment of SSI benefits), an element that is missing from this case.

personal use in a Panamanian bank account.[8] Since we have found no support for the contention that the federal government can establish jurisdiction under the Hobbs Act by relying solely on the flow of the extortion payment itself through interstate commerce, we refuse to expand the scope of the Hobbs Act to affirm the conviction in this case.

Second, the government asserts that federal jurisdiction is appropriate because, once the funds arrived in Florida, Kaplan and his co-conspirators reasonably could have been expected to use that money in interstate commerce. Although the government's argument does identify a reasonably probable effect on commerce as a result of the extortion scheme,[9] it proves too much. Given the state of the modern national and international economy, in which almost anyone can purchase goods from distant corners of the globe, the government's theory would make the Hobbs Act ubiquitous by supporting a federal prosecution in any case in which a defendant extorted any amount of money. Moreover, the

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[8] The victim's withdrawal of the funds from a bank account also fails to provide the required connection to interstate commerce. *See Blair*, 762 F. Supp. at 1393-94 (collecting cases).

[9] The government's theory might be considered the converse of the "depletion of assets" theory, which has supported the federal prosecution of defendants whose extortion produced only an indirect effect on commerce. The theory permits a Hobbs Act conviction when a defendant extorts money from a business, thereby reducing its ability to purchase goods or participate in interstate commerce. *See e.g., United States v. Alexander*, 850 F.2d 1500, 1503-04 (11th Cir.) (upholding a Hobbs Act conviction against a defendant whose extortion depleted the assets of a school board that customarily engaged in interstate commerce), *vacated*, 492 U.S. 915, 109 S. Ct. 3236, 106 L. Ed. 2d 584, *amended and reinstated*, 888 F.2d 777 (11th Cir.1989).

government's argument receives virtually no support in the cases. Although a few courts have suggested that the sheer size or scope of an extortion plot might provide the required effect on commerce,[10] no court has converted the state crime of extortion into a federal matter simply by virtue of its size. If such a theory could provide a sufficient nexus to interstate commerce there would be no need to engage in the extensive analyses of how particular acts of extortion affected a victim's position in interstate commerce that are so prevalent in Hobbs Act cases. In *United States v. DiCarlantonio*, 870 F.2d 1058 (6th Cir.1989), for example, the court reversed a Hobbs Act conviction even though the defendant received $30,000 from the FBI. The defendant's receipt of the money was insufficient to sustain the conviction because the court held that the money had no connection to interstate commerce.[11] *Id.* at 1060-61; *United States v. Kaye*, 593 F. Supp. 193, 196-99 (N.D. Ill. 1984) ("In plain English . . . [the in-

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[10] This court, for example, has suggested, in *dicta* and without the benefit of supporting authority, that a Hobbs Act prosecution may be appropriate if the sheer size of an extortion demand implies that the defendants' use of the funds could be expected to affect interstate commerce. *See United States v. Farrell*, 877 F.2d 870, 875-76 (11th Cir. 1989) (defendants had demanded in excess of $1.5 million); *see also Collins*, 40 F.3d at 100 & n.21 (citing *Jund v. Town of Hempstead*, 941 F.2d 1271, 1285 (2d Cir.1991)(affirming the Hobbs Act conviction of defendants who required a large number of victims to make political contributions in order to win and to retain public employment)). We find such a result untenable, both on the facts of this case and as a matter of law.

[11] The *DiCarlantonio* court, however, sustained the convictions for conspiracy to violate the Hobbs Act because the defendants in that case expected the extorted funds to come from a business engaged in interstate commerce. *Id.* at 1061-62.

dictment] charges an effect on interstate commerce *by the payment of money*, a contention on which there has been a failure of proof in . . . [jurisdictional] terms."); *see also Collins*, 40 F.3d at 99 (holding that the movement of a car, the proceeds of a robbery, in interstate travel was insufficient to support jurisdiction under the Hobbs Act).

The government's position also runs afoul of our requirement that the effect on commerce be adverse. *See United States v. De Parias*, 805 F.2d 1447, 1450 (11th Cir. 1986); *see also United States v. Waters*, 850 F. Supp. 1550, 1562 (N.D. Ala. 1994) (applying the rule). Although a few of our sister circuits have criticized our choice of words in *De Parias*,[12] the requirement of an adverse effect on commerce is consistent with the language of the statute and describes the typical Hobbs Act prosecution in which a defendant targets a business entity and thus hampers that victim's ability to engage in commerce. Instead, the government's argument focuses on an *increase* in interstate commerce arising out of the defendant's ability to spend the proceeds of the extortion scheme. Moreover, even if we were inclined to agree with the government's criticism of *De Parias*, "[t]he law in this circuit is emphatic that 'only a decision by this court sitting

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[12] Perhaps most notably, the U.S. Court of Appeals for the Fourth Circuit has held that: "Although the word 'adverse' has been loosely used in expressing the effect on interstate commerce, such adverse effect is not an essential element of the crime that must be proved by the prosecution in a Hobbs Act case." *United States v. Bailey*, 990 F.2d 119, 126 (4th Cir.1993). *Compare United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir.1982) ("Even a beneficial effect on interstate commerce . . . is within the prohibition of the statute.") and *United States v. Tormos-Vega*, 959 F.2d 1103, 1113 (1st Cir.1992) (same) *with McLaughlin v. Anderson*, 962 F.2d 187, 194 (2d Cir.1992)(requiring an adverse effect) and *United States v. Snyder*, 930 F.2d 1090, 1093 (5th Cir. 1991)(same).

en banc or the United States Supreme Court can overrule a prior panel decision.'" *United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir.1991) (per curiam) (quoting *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986)).

CONCLUSION

We conclude that the government failed to establish the effect on commerce required to support a prosecution for extortion under the Hobbs Act. Our decision, however, hardly vindicates Kaplan, and we note that the State of Florida remains free to prosecute Kaplan on the facts of this case. *See* Fla. Stat. Ann. § 836.05 (defining the crime of extortion under Florida State law). Nevertheless, the evidence in this case does not support a federal prosecution under the Hobbs Act. Accordingly, we REVERSE his conviction.

APPENDIX B.

148 F.3d 1223, U.S. v. Kaplan, (C.A.11 (Fla.) 1998)

***1223 148 F.3d 1223**

11 Fla. L. Weekly Fed. C 1721

UNITED STATES of America, Plaintiff-Appellee,
v.
Barry KAPLAN, Defendant-Appellant.

No. 95-4908.
United States Court of Appeals,
Eleventh Circuit.
July 31, 1998.

Bruce A. Zimet, Ft. Launderdale, FL, for Defendant-Appellant.

William A. Keefer, Linda Collins Hertz, Anne Ruther Schultz, Kathleen M. Salyer, Lawrence D. LaVecchio, Adalberto Jordon, U.S. Attys., Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida (No. 94-422-CR-SH), Shelby Highsmith, Judge.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

(Opinion January 22, 1998, 11th Cir., 133 F.3d 826).

Before HATCHETT, Chief Judge, and TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL and MARCUS, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

APPENDIX C.

UNITED STATES of America,
Plaintiff-Appellee,
v.

BARRY KAPLAN, Defendant-Appellant.

No. 95-4908.

United States Court of Appeals,
Eleventh Circuit.

April 9, 1999.

Defendant was convicted in the United States District Court of the Southern District of Florida, No. 94-422-CR-SH, Shelby Highsmith, J., of attempted extortion and conspiracy to commit extortion under Hobbs Act. Defendant appealed. The Court of Appeals, 133 F.3d 826, reversed, and rehearing en banc was granted. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) given intended transfer of funds from Panama to United States for purpose of paying extortion demand, there was sufficient evidence that defendant's attempt and conspiracy to extort would have had and did have at least a minimal effect on commerce, as required to prosecute under Hobbs Act, and (2) to convict under the Hobbs Act, effect on commerce need not be adverse; overruling, *United States v. De Parias*, 805 F.2d 1447 (11th Cir.1986).

Affirmed.

Birch, Circuit Judge, filed dissenting opinion, in which Tjoflat, Anderson and Barkett, Circuit Judges, joined.

Bruce A. Zimet, Ft. Lauderdale, FL, for Defendant-Appellant.

Anne Ruth Schultz, Kathleen M. Salyer, Lawrence D. LaVecchio, Adalberto Jordan, U.S. Attys., Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT, Chief Judge, and TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL and MARCUS, Circuit Judges.

EDMONDSON, Circuit Judge:

This controversy arises from defendant's conviction of attempted extortion and conspiracy to commit extortion under the Hobbs Act. We conclude that the government presented sufficient evidence to support the jury's findings for the Hobbs Act violations, and we affirm the convictions.

Background

In 1984 and 1985, Defendant Barry Kaplan, a resident of Miami, Florida, placed several hundred thousand dollars[1]

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[1] Evidence indicates that Kaplan, in 1989, believed that he had a balance of approximately $550,000 remaining in the accounts.

into two Panamanian bank accounts through the aid of a Panamanian lawyer named Pablo Arosemena. Kaplan gave Arosemena power of attorney over the two bank accounts for the ostensible purpose of disguising Kaplan's ownership of the funds and thereby evading taxation in the United States. Between 1984 and 1989, transfers of funds were made[2] from the accounts to different banks located throughout the world.[3]

In 1988 or 1989, Kaplan, in financial peril, sought return of the money. But Arosemena refused and allegedly threatened Kaplan. Kaplan then enlisted the help of Mario Fonseca, another Panamanian lawyer, to attempt to recover the money. Fonseca investigated the matter and found that Arosemena had taken money from the accounts. Fonseca testified that Arosemena threatened to report Kaplan's offshore funds to the United States Internal Revenue Service if Kaplan pursued the matter.

After deciding against a civil suit or criminal prosecution against Arosemena in Panama, Kaplan discussed his predicament with Roy Gelber, then a Dade County Circuit Judge.[4] Gelber then contacted Raymond Takiff, a Florida lawyer who had represented General Manuel Noriega, the de facto leader of Panama at the time.

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[2] From the record, whether some or all of these transfers were made at Kaplan's request or whether Arosemena made the transfers for himself, to repay his own personal and business debts, is unclear.

[3] A Panamanian lawyer who investigated the accounts for Kaplan testified that approximately one million dollars had been "run through" the accounts.

[4] Gelber had previously represented Kaplan on another matter while Gelber was still in private practice.

Kaplan, Gelber and Takiff began to discuss the matter in June 1989 and continued to do so until the early part of 1990. Takiff claimed that he could facilitate the retrieval of Kaplan's money through his connections to the Panamanian Defense Force. Takiff reported to Gelber on many occasions, by telephone from various states, that he had been in Panama working on Kaplan's problem. Takiff also told Gelber that he would be utilizing an officer in the Panamanian Defense Force to obtain the funds from Arosemena and that this officer and his cohorts would have to be paid, in Panama, for their efforts. During a taped conversation,[5] Takiff expressed concern that Arosemena could be killed in the process; and Gelber said that he had relayed this information to Kaplan.

Gelber, Takiff and Kaplan met in person in September 1989 to discuss the plan to obtain the money.[6] Takiff told Kaplan that soldiers from the Panamanian Defense Force would be sent to Arosemena's office and that the soldiers would force Arosemena to sign cards for the withdrawal of the money. Takiff warned Kaplan that, although Takiff did not want Arosemena to be injured, Arosemena could be killed. Kaplan was aware that violence would play a part in the transaction and agreed to the details of the plan.

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[5] Without the knowledge of Kaplan and Gelber, Takiff had begun, in August 1989, to cooperate with the federal government in an attempt to resolve his own criminal problems. Under the direction of law enforcement officials, Takiff began to record his conversations with Kaplan and Gelber. The audio and video tapes (and transcripts of the same) were admitted into evidence at trial.

[6] Takiff also tape recorded this meeting pursuant to his agreement to cooperate with the government.

About the expected proceeds, Takiff initially suggested that the funds be transferred by wire. Kaplan at one point suggested that he could go to Panama to pick up the money himself. But ultimately, the coconspirators agreed that Kaplan would accept a check in Florida, payable to a Bahamian lawyer, referenced to an offshore account. Kaplan was advised that expenses, including Takiff's air travel between the United States and Panama in furtherance of the plot, would be deducted by Takiff from the recovered money. Takiff and Gelber were to split evenly 40% to 50% of the net proceeds, with the remaining amount going to Kaplan.

As part of the government's process of investigating, Kaplan was informed (untruthfully) that, pursuant to the plan, soldiers did visit Arosemena and that force was used in an effort to obtain access to the money. The plan, however, was never actually carried out.

Kaplan was indicted for conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (Count I), and attempted extortion in violation of the Hobbs Act and the Travel Act, 18 U.S.C. § 1951 and 2 respectively (Count III).[7] The jury returned a verdict finding Kaplan guilty on both counts.[8] Kaplan was sentenced to thirty months incarceration and a $6,000 fine.

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[7] Kaplan was also charged with collection of an extension of credit by extortionate means, in violation of 18 U.S.C. § 894. The trial court granted him a judgment of acquittal on this charge at the conclusion of all the evidence.

[8] For Count III, judgment was entered only on the Hobbs Act violation.

Kaplan appealed, arguing, among other things, that the government had failed to present sufficient evidence of an effect on commerce under the Hobbs Act. A panel of this court reversed his convictions. *United States v. Kaplan*, 133 F.3d 826 (11th Cir.), *vacated and reh'g en banc granted*, 148 F.3d 1223 (11th Cir.1998). The panel believed that the government must prove an adverse effect on independent, pre-existing commerce to satisfy the Hobbs Act. *Id.* at 829, 831.

We granted the government's petition for rehearing en banc in this Hobbs Act case to decide whether the evidence established the requisite effect on commerce, including whether that effect must be adverse to satisfy the Hobbs Act.[9]

Discussion

The Hobbs Act prohibits extortion, and attempts or conspiracies to extort, that "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a).[10] "Commerce" is defined in the Act as "all commerce between any point in a state . . . and any point outside thereof." 18 U.S.C. § 1951(b)(3). Two elements are essential for a Hobbs Act

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[9] Kaplan's other arguments—about the jury instructions, sentencing, evidence of extortion, and extraterritorial application of the Hobbs Act—lack merit and are not discussed herein.

[10] The statute states, in pertinent part: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." § 1951(a).

prosecution: extortion and an effect on commerce. Kaplan, 133 F.3d at 828; § 1951(a). This appeal concentrates on the latter requirement: the effect-on- commerce element.[11]

I.

The Supreme Court has explained that the Hobbs Act contemplates full application of Congress's commerce power: the "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). And "[w]e have already determined as a matter of law that the impact on commerce does not need to be substantial; all that is required is minimal impact." *United States v. Castleberry*, 116 F.3d 1384, 1388 (11th Cir.1997); *see also United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir.1999) ("[A]n individual defendant's conduct need not substantially affect commerce precisely because the Hobbs Act regulates general conduct—robberies and extortion—which in the aggregate affects commerce substantially.").

The Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt to extort and conspiracy to extort. "Where attempted extortion or conspiracy to extort are charged, the interstate nexus may be demonstrated by evidence of potential impact on interstate commerce, or by evidence of actual, de minimis impact." *United States v. Farrell*, 877 F.2d 870, 875 (11th Cir.1989) (citations omitted); *see also United States v. DiCarlantonio*, 870 F.2d 1058,

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[11] Kaplan properly preserved this issue for our review by his Rule 29 motions questioning the sufficiency of the evidence.

1061-62 (6th Cir. 1989) ("While a substantive Hobbs Act violation requires an actual effect on interstate commerce, a conspiracy charge requires the government to prove only that defendants' scheme would have affected commerce."). So, the government need only show a realistic probability of an effect, or some actual de minimis effect, on commerce to bring the extortion within the reach of the Hobbs Act.

Kaplan contends the government failed to bring forth sufficient evidence that the scheme would have produced an effect on commerce. The main question in this case, then, is whether, viewing the evidence in the light most favorable to the government, sufficient evidence was presented to allow a jury to find Kaplan guilty beyond a reasonable doubt. *See Castleberry*, 116 F.3d at 1387-88.

The government brought forth evidence that, if Kaplan's scheme had succeeded, commerce would have been affected. The conspiracy *required* at least one transaction between Florida and Panama[12]—the payment of the extortion demand to Kaplan[13]—for the conspiracy to be of benefit to the coconspirators. Kaplan sought access to these funds because he had exhausted his personal assets, and the coconspirators were to be paid from the money Kaplan received. So, the

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[12] Kaplan does not contest the existence of substantial, general commerce between the United States and Panama.

[13] According to Kaplan, once the funds had been obtained from Arosemena, they were to be transferred to Kaplan at an undetermined location in an undetermined manner. But, the government presented sufficient evidence to allow the jury to conclude that Kaplan would receive the money in the form of a check in Florida. And we must, in this appeal, view the facts in the light most favorable to the government, drawing all inferences and credibility choices in favor of the jury's verdict. *See Castleberry*, 116 F.3d at 1387-88.

jury was entitled to find that the movement of substantial funds from Panama to Florida was the object of the coconspirator's extortion plan. *See United States v. Eaves*, 877 F.2d 943, 946 (11th Cir.1989) (determining that payment of monies between Georgia and Florida satisfied Hobbs Act's effect-on-commerce element); *United States v. Staszcuk*, 517 F.2d 53, 56 (7th Cir.1975) (en banc) (affirming conviction where effect on commerce from the extortion would have been the movement of building materials across state lines); *see also United States v. Hollis*, 725 F.2d 377, 380 (6th Cir.1984) (noting that interstate payment of money from which victim was extorted constituted commerce).

Kaplan argues that the transfer of funds to the United States would constitute a later use of the proceeds of the extortion rather than the extortion itself,[14] which Kaplan says was to occur wholly within Panama. But, given the evidence, the jury did not have to find a clean break between the forceful acts and the movement of funds. For example, the evidence did not demand a finding that there were to be two conspiracies—one to extort and a different one to transfer funds internationally. Instead, the jury could view the planned transfer of the money to Florida as evidence that the attempt and conspiracy to extort would have affected commerce within the meaning of the Hobbs Act. *See United States v. Taylor*, 966 F.2d 830, 836 (4th Cir.1992) (finding "no merit to . . . contention that the . . . Hobbs Act require[s] interstate commerce to have been affected by the extortion and not by a result of the extortion"); *see also United States v. Blair*, 762 F. Supp. 1384, 1389 n.7 (N.D. Ca. 1991) ("An

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[14] "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2).

individual may be extorted in a manner which affects interstate commerce if the actual extortionate payment forces the individual to perform a direct interstate transaction."). In this case, a close and continuing nexus exists between the acts of coercion and the transmittal of the funds to Florida: the plan would have served no purpose if the money was not ultimately received by Kaplan in Florida.

The government's proof at trial also showed that, within the framework of the plan, Takiff was to travel from Florida to Panama.[15] The plan was orchestrated in the United States to be carried out in another country. So, the different locations of the coconspirators necessitated activity in interstate and foreign commerce to coordinate the scheme. Takiff told Kaplan, at one of their meetings in the United States, that Takiff could set up the plan "with a phone call." During recorded conversations, Takiff offered to contact high ranking individuals in the Panamanian Defense Force (in Panama) who could retrieve the money from Arosemena in Panama.[16]

Also material to our decision is the government's evidence of an actual effect on commerce. Gelber testified that he often spoke to Takiff on the telephone, while Takiff was

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[15] As Kaplan's own brief states, "Takiff made it clear to Kaplan and Gelber that Takiff's presence in Panama was essential to insure that nothing harmful happened to Arosemena."

[16] Anticipating this proof at trial, Count I of the indictment charged: "It was part of the conspiracy that the defendant would and did contact an individual he believed to have influence with the Panamanian Defense Force ("PDF") for the purpose of employing PDF soldiers to use actual and threatened force, violence and fear to induce Pablo Arosemena to consent to give money to the defendant."

in other parts of the country. *See United States v. Atcheson*, 94 F.3d 1237, 1243 (9th Cir.1996) ("[Defendants'] placement of out- of-state phone calls [in furtherance of conspiracy to extort] . . . created a further connection with interstate commerce."). And Gelber testified that Takiff often reported that he had traveled to Panama and had been working on Kaplan's problem. "There is nothing in the legislative history of the Hobbs Act that would require an effect on commerce subsequent to, rather than contemporaneous with, the extortion." *Hollis*, 725 F.2d at 380.

Kaplan argues that his conduct, if a crime at all, constitutes a Travel Act[17] violation, and not a Hobbs Act violation. But the use of interstate or foreign transportation and communication facilities to carry out a scheme of robbery or extortion may constitute—in conjunction with other facts—a sufficient effect upon commerce for a Hobbs Act conviction for conspiracy or attempt to extort. *See Atcheson*, 94 F.3d at 1243 ("To support . . . conviction of conspiracy [to violate the Hobbs Act], the Government need only show that the totality of [the coconspirators'] actions had a de minimis effect on interstate commerce."). And, the same conduct may vio-

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[17] The Travel Act proscribes the "travel[ ] in interstate or foreign commerce or [use of] the mail or any facility in interstate or foreign commerce, with intent to -

> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, [or] carry on . . . any unlawful activity,"

and thereafter performs or attempts to perform one of the foregoing acts. 18 U.S.C. § 1952.

late more than one statute.[18] *See, e.g., Missouri v. Hunter*, 459 U.S. 359, 366-68, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) (noting, in context of double jeopardy analysis, that multiple statutes may proscribe the same conduct).

In this case, the potential effects, combined with the evidence of actual effects, are sufficient to establish the minimal effect on commerce required under the Hobbs Act.

II.

Having determined that the conduct of Kaplan and his co-conspirators did and would affect commerce, we must next decide whether that effect must be adverse to satisfy the Hobbs Act. The panel believed that it was bound by *United States v. De Parias*, 805 F.2d 1447 (11th Cir.1986), to require an adverse effect on commerce under the Hobbs Act. *See Kaplan*, 133 F.3d at 831. The *De Parias* opinion says at one point that one of the requirements of the Hobbs Act is that the "coercion occur[] in such a way as to affect *adversely* interstate commerce." *Id.* at 1450 (emphasis added). We question whether the statement in the *De Parias* opinion was indeed binding.[19] But, even if it was, to the extent that *De Parias* required an adverse effect, we now overrule it.

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[18] But judgment was not entered against Kaplan on the Travel Act violation.

[19] Neither *De Parias* nor the cases it cites directly presented the question now before us: whether only adverse effects matter under the Hobbs Act. And, other than the initial statement quoted above, *De Parias* speaks more generally of "an effect on interstate commerce," "a connection with interstate commerce," or "a nexus with interstate commerce." *De Parias*, 805 F.2d at 1450, 1451. The panel may have drawn the holding of *De Parias* too broadly.

The Hobbs Act punishes "whoever *in any way* or degree . . . affects commerce . . . by robbery or extortion." § 1951(a) (emphasis added). "These words do not lend themselves to restrictive interpretation." *United States v. Culbert*, 435 U.S. 371, 373, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978). No modifier of the verb "affect" is in the plain language of the statute. *See McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996) ("'We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)). The Act's language is broad, and it is evidence that Congress intended to protect commerce from any and all forms of effects, whether they are direct or indirect, actual or potential, beneficial or adverse.[20] For courts to require the effect on commerce to be adverse would significantly narrow the statute. *See Culbert*, 435 U.S. at 380 ("Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language.").

Other courts have refused to engraft the word "adversely" onto the plain statutory language. *See United States v. Bailey*,

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[20] Consideration of decisions arising under other statutes with similar language may inform our opinions sometimes. But, today's decision rests directly on the facts of *this* case and the language of *this* statute. To the extent that decisions applying other statutes may differ, that difference seems to result from different facts, different statutory language, different legislative history, different precedents or some combination of these things. We think these differences render comparisons to today's decision unhelpful.

990 F.2d 119, 126 (4th Cir.1993) ("Although the word 'adverse' has been loosely used in expressing the effect on interstate commerce, such adverse effect is not an essential element of the crime that must be proved by the prosecution in a Hobbs Act case."); *see also United States v. Tormos-Vega*, 959 F.2d 1103, 1113 (1st Cir. 1992) (stating that beneficial effect is sufficient); *United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) ("Even a beneficial effect . . . is within the prohibition of the statute."). Although Kaplan has not pointed to cases from other circuits, we recognize that some other circuits have written that an adverse effect is an element of a Hobbs Act case. *See McLaughlin v. Anderson*, 962 F.2d 187, 194 (2d Cir. 1992); *United States v. Snyder*, 930 F.2d 1090, 1093 (5th Cir. 1991). But, we are unpersuaded by the adverse-effects language in the *McLaughlin* and *Snyder* opinions.[21] Furthermore, like *De Parias*, neither of those cases directly presented the question of whether only an adverse effect on commerce will do; and neither opinion applies an only-adverse-effects-matter requirement to decide the case then before the court.

Because we have determined that the effect on commerce under the Hobbs Act need not be adverse, it is unnecessary for us to characterize the effect on commerce in this case.[22] Potential and actual effects exist in this case, and that is all the Act requires.

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[21] We do stress that the scope of the Hobbs Act is not unlimited. But, we, as judges, cannot rewrite the statute to add the term "adverse."

[22] We note, however, that the jury instructions required a finding that the extortion attempt "would have delayed, interrupted or adversely affected interstate commerce."

We see the federalism concerns involved in this case. We do not wish to expand federal criminal jurisdiction to contexts that the states are best positioned to address. And we stress that the statutory language requires the prosecutor to prove a definite connection with commerce in every Hobbs Act case. But the Hobbs Act—as Congress has written it and, therefore, as we must apply it—has a broad reach. Our duty is to apply the law, as we understand it is, to the facts before us. And an examination of the facts of this case, given the overall circumstances, shows sufficient evidence to allow a jury to conclude properly that an effect on commerce exists.[23]

Based on our review of the record, sufficient evidence was presented to support the jury's finding that Kaplan was guilty of crimes covered by the Hobbs Act. Sufficient evidence shows that Kaplan's attempt and conspiracy to extort would have had and did have at least a minimal effect on commerce. Therefore, Kaplan's convictions are AFFIRMED.

AFFIRMED.

BIRCH, Circuit Judge, dissenting, in which TJOFLAT, ANDERSON and BARKETT, Circuit Judges, join:

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[23] Several theories on how the effect-on-commerce element may be established generally have been advanced by the government in this case. But, the language of the statute governs our result. We announce no sweeping theories today. The effect-on-commerce question requires a fact-specific inquiry, *see Staszcuk*, 517 F.2d at 58 (stating that enforcement of Hobbs Act necessarily proceeds on a case-by-case basis); and we base our decision on the particular facts with which we are presented.

I respectfully dissent. The majority's holding will result in the federalization of any crime involving extortion to acquire money. Plainly stated, "[t]his is a case about federalism."[1] If we were to accept the government's position on this issue, the Hobbs Act would completely subsume state extortion and robbery laws by creating a federal criminal offense in each and every case in which the pay-off is at all likely to cross state lines. Surely, Congress cannot have intended any such result.

The plain and unambiguous language of the statute draws a distinction between extortion that *affects* commerce and extortion that *constitutes* or *produces* commerce.[2] Although

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[1] The phrase belongs to Justice O'Connor, *see Coleman v. Thompson*, 501 U.S. 722, 726, 111 S. Ct. 2546, 2552, 115 L. Ed. 2d 640 (1991), but a recent decision of our own court (which found federal jurisdiction under the Hobbs Act) raised the same concerns and cautioned against interpreting the Act in a manner that would "obliterate the distinction between what is national and what is local and create a completely centralized government." *United States v. Paredes*, 139 F.3d 840, 844 (11th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 572, ___ L.Ed.2d ___ (1998)(quoting *United States v. Lopez*, 514 U.S. 549, 557, 115 S.Ct. 1624, 1628-29, 131 L.Ed.2d 626 (1995)).

[2] Two cases arising under the robbery prong of the Hobbs Act may help demonstrate this distinction in cases involving individual victims. In *United States v. Flores*, 855 F. Supp. 638 (S.D.N.Y. 1994), the defendant had assaulted two victims as they entered their apartment and robbed them of $4000. After noting the defendant's characterization of the event as a "garden variety" robbery, the court found an *affect on commerce* because the money represented the proceeds of the victims' flower business and was to have been deposited in a business account. By contrast, in *United States v. Quigley*, 53 F.3d 909, 910 (8th Cir. 1995), the defendants spotted their victims walking along the road at night, offered them a ride, and proceeded to rob them of all they had: "eighty cents and a near-empty pouch of chewing tobacco." The government unsuccessfully

Congress has the power to criminalize both types of extortion, the Hobbs Act addresses only the former.

The most convincing argument that the majority's sweeping interpretation must be wrong is the fact that the government and the courts have undertaken what is often a searching inquiry to find how the crime in question affected the victim's ability to conduct business. More specifically, in all the extortion cases available for examination, the courts have searched for some such effect on commerce even though *money, the most common form of extortion proceeds, is uniquely likely to enter interstate commerce.* If establishing jurisdiction under the Hobbs Act were as easy as showing a likelihood that the proceeds would travel in interstate commerce, surely the government and the courts historically would not have gone to the effort to establish alternative (and often tenuous) connections to commerce.

Finally, I note that in a similar line of authority that has developed in the case law applying the analogous language of the federal arson statute we have taken a different tack. That statute criminalizes the destruction of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity *affecting interstate or foreign commerce* . . . ." 18 U.S.C. § 844(i) (emphasis added). In *Russell v. United States*, 471 U.S. 858, 105 S. Ct. 2455, 85 L. Ed. 2d 829 (1985), the Supreme Court held that the statute required the targeted property to have some con-

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advanced a number of theories to provide the required effect on commerce, including the fact that the victims were in the process of procuring beer. The court, however, did not discuss the fact that the defendants could have moved or spent their ill-gotten gains in interstate commerce and concluded that the government had not established federal jurisdiction.

nection to business: "In sum, the legislative history suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description [namely police stations and churches], but perhaps not every private home." *Id.* at 862, 105 S.Ct. at 2457. In applying section 844(i) we have gone to lengths to connect the destroyed property with interstate commerce and have held the line against making every act of arson a federal crime. Compare *United States v. Grimes*, 142 F.3d 1342 (11th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 840, 142 L.Ed.2d 695 (1999) (finding jurisdiction over arson involving commercial rental properties) *with United States v. Denalli*, 73 F.3d 328 (11th Cir.) (per curiam), *modified* by 90 F.3d 444 (11th Cir.1996) (per curiam) (no jurisdiction under section 844(i) for arson involving a private residence). Since we have taken the required connection to commerce seriously in the section 844(i) context, it is inconsistent for us to further dilute the jurisdictional requirement under the Hobbs Act . . . and that is what the majority opinion accomplishes today. The heretofore clearly marked channel of the stream of commerce has been muddied which will likely result in a flood of former state extortion cases into the already drowning federal court system.

Supreme Court, U.S.
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No. 99-75

In the Supreme Court of the United States

BARRY KAPLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government offered sufficient proof of an effect on interstate or foreign commerce to support petitioner's convictions for conspiring to commit, and attempting to commit, extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the Hobbs Act requires proof of an adverse effect on commerce.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 17a-34a) is reported at 171 F.3d 1351. The order of the court of appeals vacating the panel opinion and granting rehearing en banc (Pet. App. 15a-16a) is reported at 148 F.3d 1223. The panel opinion of the court of appeals (Pet. App. 1a-14a) is reported at 133 F.3d 826.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 9, 1999. The petition for a writ of certiorari was filed on July 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951, and one count of attempted extortion, in violation of 18 U.S.C. 1951 and 2. Petitioner was sentenced to 30 months' imprisonment, to be followed by a three-year term of supervised release. A panel of the court of appeals reversed. Pet. App. 1a-14a. The court of appeals vacated the panel opinion and granted rehearing en banc. *Id.* at 15a-16a. The en banc court of appeals affirmed petitioner's convictions. *Id.* at 17a-34a.

1. In 1984 and 1985, petitioner, a resident of Florida, utilized the services of Panamanian lawyer Pablo Arosemena to place several hundred thousand dollars into two Panamanian bank accounts. Between 1984 and 1989, various transfers of funds were made from those accounts to bank accounts throughout the world. Petitioner gave Arosemena power of attorney over the Panamanian accounts to disguise petitioner's ownership of the funds and thereby evade taxation in the United States. Pet. App. 18a-19a.

In 1989, petitioner was in financial peril and sought return of the funds that remained in the Panamanian accounts. Arosemena refused to return the funds, however, and threatened to report petitioner to the United States Internal Revenue Service if petitioner continued to press for the money. Petitioner hired another Panamanian attorney, Mario Fonseca, to investigate the matter, and Fonseca discovered that Arosemena had withdrawn money from the accounts. Pet. App. 19a.

Petitioner then consulted Roy Gelber, a newly-elected Dade County Circuit Judge, who had previously represented petitioner when Gelber was in private practice. Gelber in turn consulted his friend Raymond Takiff, a Florida attorney who was representing General Manuel Noriega, then the de facto ruler of Panama. Petitioner, Takiff, and Gelber devised a plan whereby soldiers from the Panamanian Defense Force would be sent to Arosemena's office and would force him to sign cards for the withdrawal of petitioner's money. The conspirators ultimately agreed that petitioner would accept a check in Florida, payable to a Bahamanian lawyer, referenced to an offshore account. Pet. App. 19a-21a.

Unbeknownst to petitioner or Gelber, Takiff had begun cooperating with United States law enforcement officials shortly after the formation of the conspiracy. As part of the government's investigation, petitioner was informed (untruthfully) that Panamanian soldiers had visited Arosemena and had used force against him in an effort to obtain access to petitioner's money. In fact, however, the plan was never carried out. Pet. App. 20a-21a & n.5.

2. At the conclusion of the evidence at trial (Pet. App. 21a), the district court granted petitioner's motion for a judgment of acquittal on a charge of collecting an extension of credit by extortionate means, in violation of 18 U.S.C. 894. Petitioner was convicted of conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; and attempted extortion, in violation of 18 U.S.C. 1951 and 2.[1]

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[1] The Hobbs Act establishes criminal penalties for any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by

3. A panel of the court of appeals reversed, holding that the government had failed to establish the nexus to interstate commerce required by the Hobbs Act. Pet. App. 1a-14a. The court stated that "[t]he typical Hobbs Act case involves some element of commerce independent and apart from the transaction of paying an extortionist's demand." *Id.* at 8a. In the court's view, the "legislative emphasis on protecting industry and business explains the judicial focus on the victim's connection to interstate commerce rather than the form or structure of the extortion payment." *Id.* at 9a. The court acknowledged that "Congress has the power to make the receipt of an extortion payment across a State border a federal crime," but it concluded that "the language and history of the Hobbs Act does not indicate that Congress intended this statute to perform any such function." *Ibid.*

Relying on *United States* v. *DeParias*, 805 F.2d 1447, 1450 (11th Cir. 1986), the court of appeals panel concluded in addition that "[t]he government's position also runs afoul of our requirement that the effect on commerce be adverse." Pet. App. 13a. The court acknowledged that "a few of our sister circuits have criticized our choice of words in *DeParias*," but it asserted that "the requirement of an adverse effect on commerce is consistent with the language of the statute and describes the typical Hobbs Act prosecution in which a defendant targets a business entity and thus hampers that victim's ability to engage in commerce." *Ibid.*

4. The court of appeals vacated the panel opinion and granted rehearing en banc. Pet. App. 15a-16a.

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robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a).

The en banc court affirmed petitioner's convictions. *Id.* at 17a-34a.

The court held that the government had established the requisite effect on commerce through proof "that the movement of substantial funds from Panama to Florida was the object of the coconspirators' extortion plan." Pet. App. 25a. The court also observed that "[t]he plan was orchestrated in the United States to be carried out in another country. So, the different locations of the coconspirators necessitated activity in interstate and foreign commerce to coordinate the scheme." *Id.* at 26a. It noted that Takiff had traveled to Panama and had placed several interstate telephone calls during the planning stages of the plot. *Id.* at 26a-27a. The court concluded that "the potential effects, combined with the evidence of actual effects, are sufficient to establish the minimal effect on commerce required under the Hobbs Act." *Id.* at 28a.

The court rejected petitioner's contention that the Hobbs Act requires an "adverse" effect on interstate or foreign commerce. Pet. App. 28a-30a. The court observed that the words of the Act "do not lend themselves to restrictive interpretation," *id.* at 29a (quoting *United States* v. *Culbert*, 435 U.S. 371, 373 (1978)), and that "[n]o modifier of the verb 'affect' is in the plain language of the statute," *ibid.* The court concluded that the broad language of the Hobbs Act "is evidence that Congress intended to protect commerce from any and all forms of effects," and it noted that several other courts of appeals have "refused to engraft the word 'adversely' onto the plain statutory language." *Ibid.* The court recognized that the Second and Fifth Circuits "have written that an adverse effect is an element of a Hobbs Act case." *Id.* at 30a. It observed, however, that "neither of those cases directly presented the

question of whether only an adverse effect on commerce will do," and that neither court had actually applied the "adverse effect" requirement to decide the case before it. *Ibid.*

Four members of the en banc court of appeals dissented. Pet. App. 31a-34a. The dissenting judges would have held that the language of the Hobbs Act "draws a distinction between extortion that *affects* commerce and extortion that *constitutes* or *produces* commerce." *Id.* at 32a. They acknowledged that "Congress has the power to criminalize both types of extortion," but concluded that "the Hobbs Act addresses only the former." *Id.* at 33a.

ARGUMENT

Petitioner contends (Pet. 7-16) that his extortionate scheme was not covered by the Hobbs Act because it lacked a sufficient connection to interstate commerce. He also argues (Pet. 17-19) that the Hobbs Act requires proof of an "adverse" effect on commerce. Those claims lack merit and do not warrant this Court's review.

1. a. The Hobbs Act establishes federal criminal penalties for any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). As this Court has recognized, "[t]hese words do not lend themselves to restrictive interpretation." *United States* v. *Culbert*, 435 U.S. 371, 373 (1978). Rather, the use of such broad jurisdictional language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." *Ibid.* (quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960)). See also *Allied-Bruce Terminix*

Cos. v. *Dobson*, 513 U.S. 265, 273 (1995) ("That phrase—'affecting commerce'—normally signals Congress' intent to exercise its Commerce Clause powers to the full."). As the en banc court of appeals correctly held (Pet. App. 24a-26a), the government in this case established the requisite effect on commerce through proof that the object of petitioner's extortionate scheme was to bring about the transfer of funds from a foreign country to a point within the United States.

b. Petitioner argues (Pet. 8-9) that the decision below conflicts with this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). That claim is without merit. The Court in *Lopez* held that Congress had exceeded its Commerce Clause authority by enacting a statute (18 U.S.C. 922(q)) that criminalized gun possession in the vicinity of schools without requiring proof that each instance of gun possession bore some connection to interstate commerce. The Court emphasized that Section 922(q) "by its terms ha[d] nothing to do with 'commerce'" and "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the [criminal act] in question affect[ed] interstate commerce." 514 U.S. at 561. The Hobbs Act, by contrast, is directed at a form of economic activity—extortion—and it contains an express jurisdictional element.

That the impact on interstate commerce of an individual Hobbs Act violation may be slight does not undermine the Act's constitutional validity. This Court has recognized that Congress, in enacting the Hobbs Act, intended to exercise the full extent of its Commerce Clause authority. *Culbert*, 435 U.S. at 373; *Stirone*, 361 U.S. at 215; see also *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968) ("where a general regulatory statute bears a substantial relation to commerce,

the *de minimis* character of individual instances arising under that statute is of no consequence") (quoted in *Lopez*, 514 U.S. at 558). Both before and after *Lopez*, the courts of appeals have recognized that a Hobbs Act conviction may be sustained based on evidence of a "minimal impact" on commerce. See Pet. App. 23a. As the Second Circuit has explained:

> Our cases have long recognized that the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. * * * We now expressly hold that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. * * * [O]ur sister Circuits that have addressed this question have all so held.

United States v. *Farrish*, 122 F.3d 146, 148 (1997) (citing cases from Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits) (internal quotation marks omitted), cert. denied, 522 U.S. 1118 (1998).[2]

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[2] Petitioner's reliance (Pet. 9) on *Williams* v. *United States*, 458 U.S. 279 (1982), is misplaced. The *Williams* Court relied primarily on plain-language analysis in holding that the deposit of a check that was not supported by sufficient funds "did not involve the making of a 'false statement,'" for the "simple reason" that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Id.* at 284. By contrast, the Hobbs Act literally encompasses petitioner's conduct: A scheme that would cause an extortionate payment to cross a national border constitutes an international transaction that directly "affects commerce." 18 U.S.C. 1951(a). See *Culbert*, 435 U.S. at 380 ("Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language.").

c. Petitioner relies (Pet. 9-11) on four court of appeals decisions reversing Hobbs Act convictions on the ground that the government had failed to establish a sufficient nexus between the crime and interstate commerce. Contrary to petitioner's assertion (Pet. 9), the decision below does not conflict with any of those rulings. None of those decisions endorses a per se rule that extortion or robbery of an individual (as opposed to a commercial enterprise) falls outside the Hobbs Act's coverage, and none involved a crime whose core objective was to bring about an interstate (or international) transfer of funds.

In *United States* v. *Mattson*, 671 F.2d 1020 (7th Cir. 1982), the defendants extorted $3000 from an individual who sought to obtain a supervising electrician's license from the City of Chicago. *Id.* at 1021-1023. The court reversed the Hobbs Act convictions because it found that the victim "was an individual who had no connection with interstate commerce at all," and that "the alleged conspiracy to extract money from [the victim] did not in and of itself affect interstate commerce." *Id.* at 1025. Observing that the victim's payment of $3000 did not deplete his employer's assets or affect the employer's interstate purchase of electrical supplies, *id.* at 1024, the court rejected as too attenuated the government's argument that if the victim had obtained the license, his employer's financial condition would have improved, *id.* at 1025.

The defendants in *United States* v. *Quigley*, 53 F.3d 909 (8th Cir. 1995), robbed two men of eighty cents and a pouch of tobacco, beat them, stabbed one, and left the victims on the road. *Id.* at 910. The victims were on their way to a liquor store to pick up beer at the time of the robbery, and the government argued that the crime affected commerce by preventing the victims from

reaching the store and consummating the transaction. *Id.* at 910-911. The court of appeals held that the defendants were not subject to prosecution under the Hobbs Act, explaining that the beer sale had been completed over the telephone before the robbery occurred and that there was no evidence that the victims intended to make any other purchases at the store. *Id.* at 911. The court concluded that under those circumstances, the robbery "had no effect or realistic potential effect on interstate commerce." *Ibid.*

In *United States* v. *Collins*, 40 F.3d 95 (5th Cir. 1994), cert. denied, 514 U.S. 1121 (1995), the defendant robbed a restaurant; then, as he eluded police, he stopped at a house and robbed the owner at gunpoint of cash, personal items, and his car. *Id.* at 97-98. The court of appeals reversed a Hobbs Act conviction based on the robbery at the house, finding that the crime's purported effect on commerce—a claimed interference with the victim's ability to attend a business meeting or to make business calls on his car phone—was too attenuated to satisfy the statute. *Id.* at 98-100. On those facts, the court held that the crime "caused only a speculative *indirect* effect on a business engaged in interstate commerce," an insufficient jurisdictional nexus. *Id.* at 101.[3]

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[3] Petitioner's reliance (Pet. 9, 11) on *United States* v. *Frost*, 77 F.3d 1319 (1996) (per curiam), modifying 61 F.3d 1518 (11th Cir. 1995), is also misplaced. The defendants in that case sought to provoke the resignation of a City Council member by threatening to expose a compromising videotape. The court of appeals reversed, finding that the extortionate threat was unlikely "to have the natural effect of obstructing commerce," as there was no evidence "that the resignation of one member of the six-member city council would have impacted the continuing business of that governing body." 77 F.3d at 1320. Unlike in *Frost*, the extortion

Those cases do not suggest that extortion or robbery of individuals is categorically excluded from the coverage of the Hobbs Act. Indeed, the Fifth, Seventh, and Eighth Circuits have all upheld Hobbs Act convictions in cases where an individual was the victim and the facts established an effect on commerce. See *United States* v. *Thomas*, 159 F.3d 296, 297-298 (7th Cir. 1998), cert. denied, 119 S. Ct. 2370 (1999); *United States* v. *Stephens*, 964 F.2d 424, 428-429 (5th Cir. 1992); *United States* v. *Biondo*, 483 F.2d 635, 639-640 (8th Cir. 1973), cert. denied, 415 U.S. 947 (1974); see also *United States* v. *Huynh*, 60 F.3d 1386, 1388-1389 (9th Cir. 1995); *United States* v. *Bengali*, 11 F.3d 1207, 1212 (4th Cir. 1993), cert. denied, 511 U.S. 1092 (1994); *United States* v. *Hollis*, 725 F.2d 377, 380 (6th Cir.), cert. denied, 469 U.S. 820 (1984). The decisions in *Mattson*, *Quigley*, and *Collins* rest on fact-specific determinations that the government in those cases had failed to establish any nexus between the extorted or stolen funds and any form of interstate commerce. Here, by contrast, the very object of the extortionate scheme was to bring about a transfer of funds from Panama to Florida.[4]

d. Petitioner's reliance (Pet. 14-15) on cases arising under the federal arson statute, 18 U.S.C. 844(i) (1994 &

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in this case was designed to produce a specific international movement of funds. In any event, an intra-circuit conflict would not warrant this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam)—particularly since the en banc decision in the instant case would supersede *Frost* to the extent that the two are in fact inconsistent.

[4] As the court of appeals recognized (Pet. App. 26a-27a), petitioner's scheme affected commerce in other respects as well, since the execution of the scheme involved interstate telephone calls and travel (by Takiff) between the United States and Panama.

Supp. III 1997), is also misplaced. The language of the arson statute differs significantly from that of the Hobbs Act. Section 844(i) provides criminal penalties for any person who uses fire or explosives to damage or destroy

> any building, vehicle, or other real or personal property *used in* interstate or foreign commerce *or in any activity affecting* interstate or foreign commerce.

18 U.S.C. 844(i) (1994 & Supp. III 1997) (emphasis added). By its terms, the arson statute requires proof of a nexus between the targeted property and commercial activity. The Hobbs Act imposes no such limitation.

2. Petitioner contends (Pet. 16-19) that the Hobbs Act requires an "adverse" effect on commerce. The court of appeals correctly held that the Act contains no such requirement, and its decision does not warrant this Court's review.

a. The Hobbs Act criminalizes extortion that "*in any way or degree* obstructs, delays, or *affects* commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a) (emphasis added). Because the verb "affect" is modified only by the expansive phrase "in any way or degree," the text of the Act provides no support for petitioner's contention that the requisite impact on commerce must be "adverse." Although the verbs "obstructs" and "delays" require a detrimental impact on commerce, the verb "affects" is not so limited. Indeed, Congress must be assumed to have intended each term in the series "to have a particular, non-superfluous meaning." *Bailey* v. *United States*, 516 U.S. 137, 146 (1995); see also *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will

avoid a reading which renders some words altogether redundant."). If "affects" were interpreted to mean "adversely affects," however, that term would be essentially redundant because the statutory phrase includes the terms "obstructs" and "delays."

b. Every court that has squarely considered the question has held that the Hobbs Act does not require an adverse effect on commerce. See Pet. App. 28a-30a; *United States* v. *Bailey*, 990 F.2d 119, 125 (4th Cir. 1993) ("A requirement that the effect on interstate commerce must be adverse is without support and is contrary to many cases that have found the jurisdictional requirement satisfied upon a threatened effect."); *United States* v. *Tormos-Vega*, 959 F.2d 1103, 1113 (1st Cir.) ("The commerce element may be satisfied * * * where the extortion has a beneficial effect on interstate commerce.") (internal quotation marks omitted), cert. denied, 506 U.S. 866 (1992); *United States* v. *Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) ("Even a beneficial effect on interstate commerce * * * is within the prohibition of the statute."). As the Fourth Circuit explained, "[a]lthough the word 'adverse' has been loosely used in expressing the effect on interstate commerce, such adverse effect is not an essential element of the crime that must be proved by the prosecution in a Hobbs Act case." *Bailey*, 990 F.2d at 126.

The two cases on which petitioner relies (Pet. 17 n.2) do not squarely conflict with the cases cited above. In *McLaughlin* v. *Anderson*, 962 F.2d 187 (2d Cir. 1992), the court affirmed the dismissal of a civil RICO case on the ground that the plaintiff had failed to allege with particularity two predicate acts of racketeering. *Id.* at 190-194. In finding that the plaintiff had adequately pled a single predicate act of extortion, the court described the Hobbs Act as requiring proof that the de-

fendant induced the plaintiff to part with property through the wrongful use of force, violence, or fear, "in such a way as to adversely effect [*sic*] interstate commerce." *Id.* at 194. No party raised the question whether the effect on commerce must be adverse; indeed, it is not clear from the facts described in the opinion that the impact was adverse in that case. See *ibid.* (defendant made threats "in an effort to force [the plaintiff] into a joint venture with [a third party]"). And in *United States* v. *Snyder*, 930 F.2d 1090 (5th Cir.), cert. denied, 502 U.S. 942 (1991), the court stated that "[t]he judge correctly instructed the jury that to establish an offense under the Hobbs Act, the government must prove * * * that the extortionate transaction delayed, interrupted, or adversely affected interstate commerce." 930 F.2d at 1093. The defendant (who was the appellant) in that case, however, claimed only that the court had erred in instructing the jury on an aspect of Mississippi law. See *ibid.* Because the case involved no dispute concerning the Hobbs Act's interstate commerce element, the court's language was dicta.

In short, neither of the cases petitioner cites "directly presented the question of whether only an adverse effect on commerce will do; and neither opinion applies an only-adverse-effects-matter requirement to decide the case then before the court." Pet. App. 30a. There is consequently no square conflict of authority on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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